

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

LOUIS FRANCIS,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION et al.,

Defendants and Respondents.

C061160

(Super. Ct. No. 46748)

The trial court dismissed plaintiff Louis Francis's personal injury action against the California Department of Corrections and Rehabilitation (CDCR) and eight individual CDCR employees (collectively, defendants) after sustaining defendants' demurrer to Francis's complaint without leave to amend.

In this pro se appeal, Francis contends the court erred in sustaining the demurrer without leave to amend on the ground it was not filed within the six-month limitations period for bringing a governmental tort claim (Gov. Code, § 945.6);¹ and

¹ Undesignated statutory references are to the Government Code.

erred in refusing to enter the default of three individual defendants who had not then demurred to the complaint nor otherwise responded.

His second contention has merit. Because Francis timely asked the court clerk to enter the defaults of three defendants who had been served and failed to respond to the complaint--defendants R. Gamberg, R. Weeks, and M. Dangler²--their defaults should have been entered, whether or not he can ultimately prove an entitlement to damages.

Accordingly, we shall reverse the judgment entered in favor of defendants R. Gamberg, M. Dangler, and R. Weeks, and direct the trial court to reinstate the complaint as to these defendants.

STANDARD OF REVIEW

"A demurrer challenges the sufficiency of the complaint by raising questions of law." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833.) "When reviewing a judgment dismissing a complaint after the [sustaining] of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.]

² These defendants are identified in the record by first initial and last name only.

If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

When, as here, a court sustains a demurrer without leave to amend, “we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment.

[Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred.

[Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

PROCEDURAL BACKGROUND

Allegations of the complaint

Francis is a prison inmate, who contends he was injured when prison personnel (1) improperly seized and/or disposed of his personal property and legal materials in 2006 in retaliation for his having filed and pursued a grievance; and (2) caused him to be physically attacked by another inmate in September 2007, refused to protect him from that attack, and then refused to release him from the administrative segregation in which he was placed as a result of the attack. The eight individual defendants are James Tilton, Lea Ann Chrones, M. Dangler, D.B. Lewis, N. Grannis, R. Weeks, Correctional Officer Bartos (for whom the parties give neither a first name nor initial), and

R. Gamberg. Each of the individual defendants is sued in his or her personal and official capacities.

The allegations regarding the 2006 loss of his property are these. In or about October 2006, Francis attempted to submit an inmate appeal complaining that his personal property had been improperly seized. When he attempted to submit the appeal, defendant Gamberg took possession of the personal property Francis contends was improperly seized, together with his inmate appeal; Gamberg threatened Francis and ordered him to withdraw his inmate appeal. Gamberg later returned Francis's inmate appeal form, which showed a denial of his requests for compensation and return of his property.

Francis resubmitted the same appeal in or about November 2006 to defendant Dangler for a first level response, and at the first level review of that appeal, Francis complained about Gamberg's threat and demand that Francis withdraw the appeal. Defendant Weeks then entered Francis's cell on Gamberg's instruction, seized Francis's television and two boxes of legal materials, and threw away one box of the legal materials. Francis complained to the warden about these retaliatory actions.

Francis's first level response to his appeal was unsuccessful, as was the second level response. When Francis sought a third level review of his appeal, defendant N. Grannis (acting on behalf of defendants Tilton and Chrones) denied

Francis's request and he was never able to obtain any "response . . . on the merits of the grievance whatsoever."

In or about May 2007, Francis filed a claim with the Victim Compensation and Government Claims Board (the Board), seeking damages for the destruction of his personal property and unlawful retaliation for his filing a prison grievance.

On August 28, 2007, the Board gave Francis notice it had rejected his claim.

The following month, on or about September 20, 2007, the complaint alleges, defendant Weeks (on orders from defendant Gamberg) directed an inmate to physically attack Francis. Defendants Weeks and Bartos refused to protect Francis from that attack and, afterwards, Francis was placed in administrative segregation. When Francis submitted an inmate appeal to defendant Lewis, asking to be released from administrative segregation, Lewis refused to process the appeal.

Francis filed his personal injury complaint on April 14, 2008, against CDCR and the eight individual CDCR employees, seeking damages and declaratory relief on theories of general negligence and intentional tort, for both the loss of his property in 2006, and the inmate attack in 2007.

The first demurrer

The Attorney General demurred to the complaint on behalf of the CDCR and three individual defendants: Lewis, Tilton and Chrones. The demurrer asserted that CDCR is statutorily immune from suit; Francis had failed to timely file the complaint

within six months of having had his tort claim rejected (i.e., on or before February 28, 2008) as required by sections 945.6 and 911.2; and Francis otherwise failed to state a cause of action against any defendant.

While the demurrer was pending, the trial court granted the Attorney General's request on behalf of defendant Bartos to join in the demurrer.

In his opposition to the demurrer, Francis argued his complaint should be deemed timely filed because it was mailed on February 4, 2008, before the six-month limitations period expired, but had been rejected for filing by the superior court because Francis failed to sign the original complaint, substantiate his fee waiver application, or provide copies submitted for conformance, which were exact replicas of the original. He also argued the six-month filing period should be equitably tolled because neither the form needed to prepare the required fee waiver application nor his legal papers were available to him for a month after the complaint was rejected. In response to the CDCR's assertion of immunity, Francis conceded (contrary to the allegations of his complaint) that he cannot seek monetary relief against CDCR, but intended to include CDCR as a defendant only in his declaratory relief and injunctive causes of action.

Much of the confusion in this case was caused by the next filing by the Attorney General: When the Attorney General filed his reply brief in support of the demurrer, he purported to do

so on behalf of the four individual demurring defendants (Lewis, Tilton, Chrones, and Bartos) *plus* two additional defendants who had neither given notice of their intention to demur nor asked to be added to the demurrer--defendants Weeks and Dangler. Inexplicably, the Attorney General did *not* reply on behalf of CDCR.

After a hearing on the "[d]efendants' demurrers" in July 2008, at which Francis appeared via Court Call (and which the record indicates was tape-recorded, although no transcription of the hearing appears in the record on appeal), the trial court took the matter under submission and thereafter issued its "Order on Demurrer" on August 5, 2008.³

In it, the court found that Francis's lawsuit is barred by the statute of limitations because he failed to file it within the six-month limitations period. It also rejected each of Francis's proffered reasons for excusing him from that deadline.⁴

³ The clerk's minute order of the demurrer proceeding shows that all individual defendants except N. Grannis had been personally served with the complaint.

⁴ The trial court found Francis gets no relief from application of the "prison delivery rule," whereby an inmate's civil complaint is deemed filed on the date he submits the complaint to prison authorities, because his documents were not legally sufficient to be filed on the date submitted, a flaw that the prison delivery rule cannot be deemed to correct. And, although the Government Claims Act provides a procedure to extend the time for filing by inmates who are "unable" to commence their lawsuit while in prison (§ 945.6, subd. (b)), this provision has no application to Francis, who "was clearly able to file his documents within the limitations period," but simply presented defective papers. Finally, the court held that the principles

The court sustained the demurrer without leave to amend, and directed the Attorney General to prepare the formal order and judgment of dismissal.

The judgment prepared by the Attorney General, and signed by the court on September 12, 2008, was entered in favor of defendants Tilton, Chrones, Lewis, Bartos, Weeks, and Dangler.⁵

Francis's request for entry of defaults

After the court sustained the demurrer without leave to amend, but before judgment was entered, Francis asked the superior court to enter the defaults of defendants Gamberg, Weeks and Dangler--three defendants who had been timely served, but never joined in the demurrer.⁶ The superior court supervisor refused Francis's request, on the grounds the defendants' demurrer had been sustained without leave to amend because Francis had failed to meet the statutory requirements for filing the complaint and "a default cannot be entered when the case is disposed of in its entirety."

When Francis resubmitted his request for entry of the defaults of defendants Gamberg, Weeks and Dangler, the court

of equitable tolling do not apply, and no other provision of California law supports granting Francis relief from the six-month limitations period.

⁵ The Attorney General did not ask the court to enter judgment in favor of CDCR.

⁶ As noted above, the names of defendants Weeks and Dangler were "added" to the reply brief submitted in support of the demurrer by other defendants. Gamberg's name does not appear on any document submitted in connection with the demurrer.

supervisor reiterated that, as to Francis's first request for entry of default, the court's ruling on the demurrer "clearly states you did not meet the statute filing deadline requirements on the complaint and the demurrer was granted without leave to amend and the entire case is dismissed for your failure to meet the statute requirement." The court also rejected Francis's resubmission because the demurrer "disposes [of] the case in its entirety whether the remaining defendants joined in the demurrer or not."

The second demurrer

In what he now characterizes as "an abundance of caution," the Attorney General responded to Francis's attempt to take the defaults of Gamberg, Weeks and Dangler by filing a separate demurrer on their behalf.

Francis opposed the demurrer on the grounds that his complaint was timely filed, and the demurrers of defendants Gamberg, Weeks and Dangler were not.

The trial court sustained the demurrer of defendants Gamberg, Weeks and Dangler, judgment was entered in favor of all the individual defendants, and the complaint was dismissed with prejudice.

DISCUSSION

Francis makes two contentions on appeal: (1) the trial court erred when it sustained defendants' demurrer without leave to amend; and (2) the trial court erred in refusing to enter a

default against defendants Gamberg, Weeks and Dangler. The second contention has merit.

I. The Trial Court Did Not Err in Finding Francis Failed to Comply with the Government Claims Act⁷

Francis's complaint rests its claim for damages and other relief on two series of alleged events: the 2006 loss of his personal property and the 2007 assault by another inmate.

The record shows the first demurrer was properly sustained because Francis failed to comply with the Government Claims Act as to his claims arising from both events.

A. The Statutory Scheme

California's Government Claims Act authorizes limited governmental liability for injuries suffered as a result of the acts or omissions of public entities or their employees. (§§ 815.2, 815.6.) However, a prerequisite to such liability is compliance with the claims procedure of the Government Claims Act. "Generally speaking, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented until a written claim has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776; § 945.4.)

⁷ California's Tort Claims Act (§ 810 et seq.) is commonly referred to as the "Government Claims Act," thus, we will use that term.

In addition, where the governmental entity provides the claimant with written notice of rejection by the Board, the claimant must bring an action against the entity within six months after "the date such notice is personally delivered or deposited in the mail." (§ 945.6, subd. (a)(1).) This six-month deadline "is mandatory and must be strictly complied with." (*Julian v. City of San Diego* (1986) 183 Cal.App.3d 169, 176.)

B. Injuries Arising from the Alleged 2007 Attack

As to injuries alleged in the complaint to have arisen from the September 2007 assault, nothing in the record indicates Francis ever complied with the claims presentation procedure required by the Government Claims Act. (§§ 911.2, 905.2, 950.2, 945.4.) His only apparent claim was rejected in August 2007, one month before the alleged assault, and therefore could not have included a claim for injuries from this later-occurring event. Nor does the record suggest he ever sought relief from the failure to make a timely presentation of a claim for damages based on the alleged 2007 assault. (§ 946.6.)

Francis is thus precluded from attempting to proceed with a civil action based on facts or theories not first presented to the Board. (§945.4.) Accordingly, he cannot attempt in the instant lawsuit to recover any damages arising from the alleged 2007 assault.

C. Injuries Arising from the Alleged 2006 Loss of Personal Property

As to the relief Francis seeks based on the 2006 events, the Board notified him on August 28, 2007, that his claim had been rejected. He had until February 28, 2008, to file a complaint based on his claim. The complaint was not filed until April 14, 2008.

Francis contends on appeal that his failure to file the complaint within six months of August 28, 2007, should be excused by operation of "equitable tolling."

"Equitable tolling is a judge-made doctrine 'which operates independently of the literal wording of the Code of Civil Procedure' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) "[T]he effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Id.* at pp. 370-371.)

At its broadest, equitable tolling has been described as "a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." (*Addison v. State of*

California (1978) 21 Cal.3d 313, 317.) But the doctrine of equitable tolling should not be applied if it is "'inconsistent with the text of the relevant statute' [citations] or contravenes clear legislative policy [citation.]" (*Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 371.) And, "[a]s with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the [Government] Claims Act limitations statute." (*Addison v. State of California, supra*, 21 Cal.3d at p. 321.)

Here, the judge-made doctrine of equitable tolling does not overcome the express legislative policy articulated in the Government Claims Act that a suit against a public entity or public employee on a cause of action for which a claim is required must be filed no more than six months after the public entity rejects the claim. (§ 945.6, subd. (a)(1).) The Legislature has prescribed the time and manner of filing claims against the state and public employees, and the conditions under which they may be sued, including the "valid condition . . . that 'recovery will be denied where legal action is not brought against the state within the period prescribed by the statute.'" (*Smith v. City and County of San Francisco* (1977) 68 Cal.App.3d 227, 230 [and cases cited therein].) The six-month limitations period is mandatory; "the tort claims statute 'does not indulge late suitors . . . [and . . . one's] right to sue the state and

its political subdivisions, having been formulated by statute, is circumscribed by the limitations within that statute.'" (*Ibid.*; see also *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 982.) Provisions of law outside the Government Claims Act cannot extend the limitations period. (*Dowell v. County of Contra Costa* (1985) 173 Cal.App.3d 896, 901; see also *Martell v. Antelope Valley Hospital Medical Center, supra*, 67 Cal.App.4th at p. 983 [neither normal five-day extension of time for service by mail, nor attorney mistake, inadvertence, surprise or neglect excuse the late filing of a complaint].)

We have found no case law suggesting that the doctrine of equitable tolling can ever trump the limitations period stated in the Government Claims Act, nor has Francis cited any to us. In our view, the notion of equitable tolling in this context is both inconsistent with the text of the relevant statute and contravenes clear legislative policy. (See *Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 370.) Accordingly, Francis is precluded from arguing that the doctrine of equitable tolling should have prevented the trial court from finding his complaint barred by his failure to file it within the six-month limitations period of the Government Claims Act.

II. The Superior Court Clerk Erred in Refusing to Enter the Defaults of Defendants Gamberg, Weeks and Dangler

The proofs of service in the record indicate that defendants Gamberg, Weeks and Dangler were all personally served on June 3, 2008. Absent a stipulation extending the time (and

there was none), they had until July 3 to respond to the complaint. (Code Civ. Proc., § 430.40, subd. (a); Cal. Rules of Court, rule 3.110(d).) It is undisputed that these three defendants did not respond or otherwise appear in the action within the time allowed by law.

If a defendant's responsive pleading is not served within the specified time, and no extension of time has been granted, he is "in default" and the court clerk "shall enter the default of the defendant" upon the plaintiff's request. (Code Civ. Proc., § 585, subd. (b).) In fact, the plaintiff "must" timely file a request for default, or the court may seek sanctions against him for failing to do so. (Cal. Rules of Court, rule 3.110(g).) Although it is unclear from the record whether Francis did so within the required time frame, he plainly did so without prompting from the trial court.

A court clerk has no discretion to refuse a proper request for entry of default. (*W. A. Rose Co. v. Municipal Court* (1959) 176 Cal.App.2d 67, 71.)

Here, because all of the statutory requirements were met prior to Francis's request to enter the defaults of defendants Gamberg, Weeks and Dangler, the superior court erred in refusing to grant it.

Moreover, its reasoning to the contrary was faulty. The court was mistaken in its belief that the complaint had been "disposed of in its entirety." Indeed, at the time of Francis's first request, only five of the nine originally named defendants

had filed a demurrer to the complaint--CDCR, Tilton, Chrones, Lewis, and Bartos--and the complaint could not then be dismissed as to the others.⁸ And we are at a loss to understand why the trial court clerk could have believed it had been. The clerk's "minute sheet" of the July 2008 hearing on the demurrer neither lists Gamberg, Weeks nor Dangler among the moving parties nor indicates they are represented by counsel, and the court's "Order on Demurrer" does not identify the defendants whose demurrer had been sustained.

To repair the procedural machinations that followed the erroneous denial of Francis's request for entry of the defaults of defendants Gamberg, Weeks and Dangler, we shall order stricken the court's order sustaining the second demurrer--i.e., the belated demurrer by these three defendants--and direct the superior court clerk to enter these defendants' defaults, as it should have done when Francis first made his request.⁹

⁸ We feel compelled to note here that the Attorney General was utterly unjustified in attempting to enlarge the effect of the first demurrer by preparing a judgment that dismissed the complaint as to Weeks and Dangler on the same grounds as the demurring defendants. Neither Weeks nor Dangler had then raised a statute of limitations defense, which must be raised by the individual defendants seeking to invoke it, or it is waived. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 432, pp. 549-550.)

⁹ The Attorney General may, of course, seek relief from those defaults. (Code Civ. Proc., § 437.)

DISPOSITION

The judgment in favor of defendants Gamberg, Weeks and Dangler is reversed. The order sustaining the demurrer of defendants Gamberg, Weeks and Dangler is stricken, and the superior court clerk shall enter the defaults of these three defendants. In all other respects, the judgment is affirmed. Francis shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

_____, J.
BUTZ

I concur:

_____, J.
RAYE

I concur in the judgment and in the opinion except as to part I.C. of the Discussion, as to which I concur in the result:

_____, Acting P. J.
BLEASE